the absence of constitutional restrictions, to provide for the recovery of the amount of such assessments by appropriate actions designed to that end. The exemption, to whatever extent it is granted, is wholly a matter of favor, which can be extended upon such terms as the legislature may see fit. The Ohio statute (§ 3898, P. & A. ANN. GEN. CODE) which provides that *any* unpaid special assessment may be recovered by suit against the landowner was upheld as constitutional in *Hill* v. *Higdon,* 5 Oh. St. 243; *Gest* v. *Cincinnati,* 26 Oh. St. 275. Of course if *all* of the funds of the cemetery company were held in trust for special purposes, the remedy may be of no avail.

The Detroit city charter (§ 221) provides that "the said receiver shall have power in the name of the city of Detroit to prosecute any person refusing or neglecting to pay such taxes or any special assessment by a suit in the circuit court for the County of Wayne, and he shall have, use, and take all lawful ways and means provided by law for the collection of debts, to enforce the payment of any such tax or any special assessment." Assuming the validity of such charter provision, may it not well be that by a proceeding thereunder and the assistance of the powers of a court of equity along the line of the doctrine of *McInerny* v. *Reed, supra,* and *Lima* v. *Cemetery Assoc., supra,* it would be possible to reach non-trust funds of the Association?

R. W. A.

THE RIGHT TO EMPLOY INCONSISTENT DEFENSES.—The case of *McAlpine* v. *Fidelity and Casualty Company of New York,* 158 N. W. 967, decided July 28, 1916, by the Supreme Court of Minnesota, sets forth clearly what should be the modern doctrine respecting inconsistent defenses. In an action on an accident policy for death resulting through accidental means, the defendant alleged that the death was caused by suicide and further that it was caused by the beneficiary. The court denied the plaintiff's motion that the defendant be required to elect upon which claim it would rely, the motion being based upon the ground that the two defenses were inconsistent. The Supreme Court held that the ruling of the lower court was correct.

The Minnesota statute reads as follows: "The defendant may set forth by answer as many defenses and counterclaims as he has. They shall be separately stated, and so framed as to show the cause of action to which each is intended to be opposed." (R. L. 1905, § 4132, G. S. 1913, § 7758). This provision is very similar to that found in many other state codes, and nowhere does it make the requirement of consistency among defenses. Whatever rule has come to be effective, is the result of construction, and under earlier Minnesota decisions the rule was established that separate defenses must be consistent. *Booth* v. *Sherwood,* 12 Minn. 426; *Stevenson* v. *Waterbury,* 52 Minn. 211, 53 N. W. 1146; *Rees* v. *Storms,* 101 Minn. 381, 112 N. W. 419.

The common law rule was that a defendant could plead only one defense without infringing the rule against duplicity. By the statute of 4 Anne, a party was allowed "to plead as many several matters thereto as he shall

think necessary for his defense." However, they could not be inconsistent with one another. Even what is known as inconsistency by implication of law was at first not allowed. This rule was later relaxed so as to allow all those not inconsistent in fact. The rule in equity is very similar to the related rule under the Statute of Anne, and provides that two defenses are inconsistent and cannot be pleaded together when, if the evidence supporting one is true, the evidence supporting the other cannot be true in point of fact. 48 L. R. A. 183, Notes III, IV, and V.

Textwriters have disagreed upon the weight of authority, both as to allowing inconsistent pleas, and as to what constitutes such inconsistency as will prevent defenses being joined under Code procedure. POMEROY in his work on CODE REMEDIES (4th ed.) § 598, citing cases to support him, states this to be the rule: "Assuming that defenses are utterly inconsistent, the rule is established by an overwhelming weight of judicial authority that, unless expressly prohibited by statute, they may still be united in one answer. It follows that the defendant cannot be compelled to elect between such defenses, nor can evidence in favor of either be excluded at the trial on the ground of the inconsistency." To the contrary is the following, "under the new procedure there is some contrariety in the decisions but the rule established by the weight of authority both in reason and in numbers, is in harmony with the rule in equity, that two defenses so inconsistent in point of fact that both cannot be true, so that the establishment of one is the destruction of the other, cannot be joined." PHILLIPS, CODE PLEADING, § 261. In the latter work, commenting upon the above statement of Mr. POMEROY, the author says: "He has overlooked the distinction between contradictory facts and logical inconsistency; and has reached a conclusion that is not warranted, and that is not sustained by the cases he cites to support it. It would be a reproach to our system of procedure if defendants were allowed to set up defenses *ad libitum,* without regard to whether they were true or false, consistent or inconsistent; and such license is not to be drawn from the spirit of the codes, and is not sanctioned by the weight of authority." Citing, BLISS, PLEADING, 344; BOONE, PLEADING, 78; SWANN, PLEADING, 267.

A great number of cases have apparently allowed inconsistent defenses, 48 L. R. A. 185, Note VI, a. But the courts deciding them have made quite indefinite and unsatisfactory statements as to what constitute inconsistent defenses, and an examination of the decisions shows that in many of them, and probably in a majority of them, the defenses were really not inconsistent in fact, but only in law. Logical inconsistencies and inconsistencies by implication of law have always been allowed.

There are thus developed two distinct questions,—(1) are the defenses pleaded inconsistent? and (2) if so, can they be pleaded together? And it is very noticeable that while many courts profess to disallow inconsistent defenses, they are almost invariably successful in finding that the defenses before them are susceptible of such a construction as to make them consistent. In many instances they have gone to almost absurd lengths to sustain the rule in theory while denying it any effective force in practice. *Loveland* v.

Jenkin-Boys Co., 49 Wash. 369; *Bank of Glencoe* v. *Cain*, 89 Minn. 473, 95 N. W. 308; *Bank* v. *Closson*, 29 Oh. St. 78.

The very fact that so many courts have held defenses to be consistent, when in fact they probably were not, is a very persuasive argument in favor of the conclusion reached by the principal case. The Supreme Court of Minnesota there held that the general rule (as to inconsistent defenses) should and would not be applied "so as to prevent a meritorious defense or work manifest injustice." The end sought was a speedy trial on the merits, not an artistic and symmetrical system of pleading. Their attitude is well expressed thus: "Naturally enough the legal mind revolts at a rule of pleading which requires a defendant to choose which of two defenses he will interpose, though both cannot be true, and neither is within his knowledge, at the peril of losing all if he mistakes, for when called upon to elect he is having his final day in court." It is inconsistent with the spirit of the modern procedure to refuse to allow a defendant to plead inconsistent defenses, when there is a real doubt in the pleader's mind as to what the evidence will disclose. At least, he should be allowed to state them in the alternative, stating also the reason for so doing. There is the same reason for allowing alternative statements of defenses as for allowing alternative statements of the right of action. Michigan, by its new Court Rules following the JUDICATURE ACT OF 1915, has fully abandoned the rule of consistency and allows inconsistent counts and defenses to be freely pleaded and presented to the jury. (Rule 21, § 7.) New Jersey, in its recent PRACTICE ACT, has done the same thing. (Laws, 1912, Chap. 231, § 24.) It is to be hoped that the recent Minnesota rule will have many followers, who will frankly allow inconsistent defenses instead of going to doubtful extremes in trying to adhere to the old rule by calling inconsistent defenses consistent. H. G. C.

ORAL CONTRACT TO MAKE A DEVISE OR CONVEYANCE OF LAND.—Damages can never be recovered at law for breach of a contract which does not comply with the Statute of Frauds. On the other hand, if suit is brought in equity for specific performance, such relief will be granted under some circumstances. In a recent case, the plaintiff, the niece of the deceased, was treated by him as a member of the family. During girlhood and even after marriage, she performed many services of a personal nature for the deceased and wife. In compensation for these services, the deceased orally promised to will all of his property to the plaintiff. The deceased however made no will. Upon his death, the plaintiff brought an action against the administrator for specific performance of the oral contract. *Held*, that this relief should be granted. *Rine* v. *Rine* (Neb. 1916), 158 N. W. 941. In another recent case, the facts of which were precisely similar, the New Jersey court refused to decree specific performance. *Boulanger* v. *Churchill* (N. J. 1916), 97 Atl. 947. These two contrary decisions offer an opportunity for an inquiry into the theory or theories upon which equity, under some circumstances, gives effect to an oral contract to convey or devise lands in spite of the Statute of Frauds.